No. 95-1978 (3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

CAL-ALMOND, INC., GOLD HILLS NUT COMPANY, SAULSBURY ORCHARDS AND ALMOND PROCESSING, INC., BROWNS LAKE RANCH, MAC ENTERPRISES, INC., VAN KAY, INC., and DERK VAN KONYNENBURG,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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FURTHER REASONS FOR GRANTING THE WRIT

Congress provided in § 8c(15) of the AMAA, 7 U.S.C. § 608c(15), a comprehensive scheme of administrative and judicial review of "obligations" such as the tax at issue in this case. Petitioners challenged the tax as a violation of the First Amendment and won. The Ninth Circuit held unconstitutional that portion of the assessment used for advertising and promotion. Until now, the courts have accepted USDA's argument that a post-deprivation remedy does not deny due process because it affords aggrieved handlers complete relief, i.e. a refund of any tax or assessment imposed under the AMAA. Until now, the courts have also accepted USDA's mantra that the statute should be construed to deny any pre-deprivation remedy so that the regulatory program can continue to operate while the challenge proceeds through the laborious exhaustion process. But now, USDA proposes to upset this delicate balance and eviscerate the complete remedial scheme provided by Congress by denying the traditional refund remedy for the advertising and promotion tax that was paid at the direction and with the approval of the Secretary to third parties. Respondent cites nothing from the language or legislative history of the statute, or from judicial decisions interpreting and applying the remedy provisions, to justify the severe limitation it wants to impose on the scope of the refund remedy for unconstitutional assessments. USDA's severe limitation of the refund remedy eviscerates the carefully balanced remedial scheme designed by Congress which protects program integrity while providing handlers a meaningful remedy. *United States v. Ruzicka*, 329 U.S. 287 (1946) (mandatory exhaustion does not violate due process because handlers' rights protected by post-deprivation refund remedy); *cf. Anniston Mfg. v. Davis*. 301 U.S. 337 (1937) (approving a limitation on the refund remedy that required handlers to prove they did not pass on the tax). USDA's interpretation of the AMAA would deny due process because it would leave handlers with no remedy, either pre- or post-deprivation for the portion of

the tax paid to third parties at the direction of USDA. *Reich v. Collins*, __ U.S. __, 115 S. Ct. 547 (1994). Finally, USDA's interpretation fails to account for the alternative non-monetary remedies sought by Petitioners, e.g., credits towards future assessments, or a refund from the Almond Board.

1. a. Congress unequivocally consented to Petitioners' suit for refund of the tax. Congresses could not more clearly consent to suit than in did in the AMAA by empowering injured handlers to challenge an "obligation" such as the tax at issue in this case. USDA does *not* dispute that Cal-Almond's challenge is within the scope of Congress's consent. Instead, USDA seeks to redraw the scope of that consent by excluding from the refund remedy that part of the tax USDA ordered paid to third parties.

Respondent misconstrues the "sovereign immunity issue" involved in this case (Br. in Opp. 9-10). Petitioners are challenging an "obligation," *i.e.* the tax imposed on them and exacted from them, and are not seeking traditional "money damages" (Pet. App. 7a) for an injury done do them, *see Bowen v. Massachusetts*, 487 U.S. 879, 914 (1988) (Scalia, J., dissenting). Whether Petitioners' taxes were paid directly to USDA, directly to the Board, or directly to a third party approved by USDA to receive said assessments to satisfy the Petitioners' obligation, USDA's mandate had the same affect on Petitioners, the unconstitutional exaction of money that the Petitioners were entitled to keep.

Respondent argues that a refund in the form of money is not available because Congress did not specifically provide for such a remedy. The sovereign immunity cases of this Court cannot be read so narrowly. This Court held in *Federal Deposit Insurance Corporation v. Meyer*, __ U.S. __, 114 S. Ct. 996 (1994) that Congress, enacting "sue-and-be-sued" language, broadly waved sovereign immunity against the Government or a federal agency unless Congress also precludes certain types of remedies.

> In the past, we have recognized that such sue-and-be-sued waivers are to be "liberally construed," [citation], notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign. [citations] *Burr [Federal Housing Admin. v. Burr*, 309 U.S. 242 (1940)] makes it clear that sue-and-be-sued clauses cannot be limited by implication unless there has been a 'clear showing that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a Government function, or that for other reasons it was plainly the purpose of Congress to use 'sue-and-be-sued' clause in a narrow sense.' [*Burr*, 309 U.S. 245]

Id. at 1003.

The AMAA expressly provides Petitioners with the right to petition the Secretary for an *exemption* from any *obligation* imposed under a marketing order that is "not in accordance with law," and for judicial review of the Secretary's decision. 7 U.S.C. § 608c(15)(A), (B). In *United States v. Ruzicka*, 329 U.S. 287 (1946), this Court interpreted the remedial scheme of the AMAA to provide for a complete remedy to handlers whose assessments were unlawful.[1] The Court disallowed a pre-deprivation remedy, *i.e.* injunctive relief, and required exhaustion of administrative

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1. This Court also found that with respect to predecessor legislation to the AMAA, that when the Court found the "processor tax" of the Agriculture Adjustment Act to be unconstitutional Due Process *required* a refund of the unconstitutional assessments. *Anniston MFG. v. Davis*, 301 U.S. 337 (1937); *Weibresteib Co. v. Commissioner of IRS*, 324 U.S. 164 (1945).

remedies to preserve the integrity of the program. The remedial scheme was adequate and complete because handlers were guaranteed a refund of the tax if their challenge was eventually successful. *Id.* at 292-93, 295. The assessments at issue in *Ruzicka*, like the almond program, were not paid directly to the Treasury, but to a producer settlement fund administered by third parties. The fund paid a uniform price to producers for their benefit. The refund due a successful handler was not and never has been characterized as "money damages," and was not the return of specific property but an amount of money from the fund equal to the handler's "obligation" found unlawful in the challenge.

Respondent's limitation on the remedy would eviscerate the careful balance struck by Congress and would write the word "exemption" out of § 608(c)(15). Since exhaustion of remedies is mandatory, the only way for Petitioners to receive the "exemption" allowed by Congress as a remedy is to receive a refund of the tax "obligation" found unlawful. As explained in *Meyer, supra*, quoting *Burr, supra*, sovereign immunity does not bar the refund of assessments ordered by the Secretary to be paid *or spent* as authorized by Congress (7 U.S.C.§ 608c(6)(I); Pet. App. 107a) because Congress unequivocally consented to Handlers' petitions to challenge the tax "obligation" and did not "clearly" preclude that type of remedy. *Meyer, supra*, 114 S. Ct. at 1003, citing *Burr, supra*, 309 U.S. at 205.

Moreover, Congress could not require exhaustion of administrative remedies and at the same time order the payment of assessments, and then deny a refund of said assessments found to have been unconstitutionally exacted, without violating Due Process.

Respondent butchers this Court's holding in *United States v. Ruzicka, supra*, (Br. in Opp. 11). Respondent contends that *Ruzicka* held "only" that a handler must exhaust administrative

remedies before pursuing a challenge to a marketing order in federal court and may not withhold assessments during the pendency of these proceedings, did not address the scope of the waiver of immunity in § 608c(15) or the particular remedy available in administrative or judicial proceedings. In *Ruzicka*, Respondent specifically argued that mandatory exhaustion of administrative remedies and the denial of a pre-deprivation equitable remedy did not deny due process because the handler would be entitled to a refund in the event he eventually prevailed in the administrative proceedings. No doubt, that is a reason *why* this Court held in *Ruzicka* that the statutory scheme established by Congress (7 U.S.C. § 608c(15)(A) & (B)) "will give the respondents the rights to which Congress said they were entitled" (*Id.* at 293) and that the complete remedial scheme "thereby safeguarded individual as well as collective interests." *Id.* The Respondent's attempt here to deprive Petitioners of a refund remedy for a part of their tax "obligation" aims a missile directly at the comprehensive scheme Congress established under the AMAA and as interpreted by this Court in *Ruzicka*.

Therefore, sovereign immunity cannot bar a refund remedy based solely on where the Secretary directed that part of the tax to be paid.

b. USDA argues that Handlers may not be refunded that part of the tax paid to third parties rather than to the Board. USDA cannot deny that its argument deprives Handlers of any remedy for this part of the tax. USDA's argument not only limits the scope of the consent to suit (by adding an "except for . . . " behind "obligation") but eviscerates the balanced remedial scheme approved by this Court in *Ruzicka*.

Congress made no distinction, for purposes of Handlers' right to a refund, between the various uses of the tax. The Respondent erroneously states (Br. in Opp. 3) that the creditable advertising assessment at issue here are for "private promotional

activity." In fact the tax is imposed (and the credits allowed) for mandated activities to carry out the Government's purpose of advertising and promoting California almonds. The promotion and advertising activities of the Board are "designed to assist, improve, or promote the marketing, distribution, consumption or efficient production of almonds." 7 C.F.R. § 981.41 (Pet. App. 113a). The Secretary may provide for crediting a handler's direct expenditures for marketing promotion and advertising, that promotes the sale of almonds, and that said expenditures may include "money spent for advertising space or time in newspaper, magazines, radio, television, transit and outdoor media, *including the actual standard agency commission costs not to exceed 15%.*" 7 C.F.R. § 981.41(c) (emphasis added). No "promotion or advertising shall be undertaken without reason to believe that returns to producers will improved by such activity." 7 C.F.R. § 981.41(d)(3) (Pet. App. 115a). Finally, § 981.41(e) (Pet. App. 115a) states that the Secretary, after recommendation by the Board, "shall prescribed appropriate rules and regulations as are necessary to effectively regulate such activity," which are set forth in § 981.441 (Pet. App. 117a-127a).

Therefore, the "creditable advertising" part of the tax is not "private" because Handlers spend it for the "public" benefit of producers, who are not regulated and do not pay the tax, and because they have no *choice*. The Ninth Circuit found in *Cal-Almond I* that the Petitioners not only did not benefit from the creditable advertising regulations whatsoever, but that in fact the regulations hindered their own efforts. (Pet. App. 34a-37a & n. 10).

c. USDA mischaracterizes the relief sought as "money damages." Handlers are challenging the "obligation," i.e. the tax imposed. This is not a case like *Lane v. Pena*, __ U.S. __, 116 S. Ct. 2092 (1996), in which Congress carefully crafted a scheme that provided challenges and precisely delineated remedies against a specified set of entities for a specified set of injuries.

Congress did *not* distinguish the part of the tax for which Handlers could petition for a refund from the part of the tax for which a refund is barred. The tax imposed on Handlers is a single undivided amount. The statutory "obligation" is to pay this tax to the Board, the agent of the Secretary. Congress made no distinction for purposes of the refund remedy as to how the taxes were used by the Board. The Board uses part of the tax to pay the expenses of administering this regulatory program, and part for its generic promotion program. Petitioners *must* either pay the major portion of the tax to third party advertisers approved by the Board or pay to the Board which then spends it for its various promotional and advertising programs. The Ninth Circuit found both choices unconstitutional (Pet. App. 5a, 10a-11a, *Cal-Almond II*: 25a-28a, *Cal-Almond I*).

Respondent's argument (Br. in Opp. 11-12) that Petitioners are really seeking "money damages" ignores the regulatory treatment of the "creditable" portion of the tax obligation.

First of all, § 981.81(b) of the Order (Pet. App. 115a-116a) explains that, for purposes of refunds, the Secretary treats handler expenditures to "third parties" through creditable advertising the same as payment to the Board. Thus, it is the *Respondent* that treats the two forms of expenditures exactly the same. Secondly, Congress specifically provided (7 U.S.C. § 608c(6)(I); Pet. App. 107a) the Secretary with the authority to levy assessments upon the handlers to carry out promotion and advertising, and with respect to almonds, to credit the prorata expense assessment obligations of a handler "with all or any portion of his direct expenditures for such marketing promotion including paid advertising as maybe authorized by the order." Congress specifically stated that the handler's own expenditures for advertising would be credited to the handler's prorata share of assessments otherwise required to be paid to the Secretary. (7 U.S.C. § 610; Pet. App. 110a-111a).

Third, it was the *Secretary* (as authorized by Congress) that imposed the assessment each year and required the handler to either pay it to the Board or pay it to these third parties authorized by USDA to receive those assessments, subject to the Secretary's review that the assessments were properly spent on the *Secretary's* program. (7 C.F.R. §§ 981.41 & 981.441; Pet. App. 113a-127a).[2]

Respondent ignores the Ninth Circuit's holding that both forms of exaction of assessments violated the Petitioners' First Amendment rights: "We found that the assessments implicated the handler's rights to free speech and free association, regardless of whether the assessments were paid directly to the Board or satisfied by expenditures on creditable advertising and promotional activities." (Pet. App. 5a). The panel was deeply troubled by its decision: "Our analysis regarding sovereign immunity leads us to a somewhat awkward result: although the handlers' compelled expenditures on creditable advertising violated their First Amendment rights, there is no individual remediation available for those violations." (Pet. App. 10a-11a).

Since Petitioners were required to exhaust administrative remedies and pay the assessments to the Board and/or third parties (both of which "choices" were found unconstitutional) the congressional and USDA scheme amounted to an unconstitutional exaction of Petitioners' money, regardless of where or to whom it was paid, and Petitioners' request for a refund of those unconstitutionally exacted assessments is nothing more than an equitable remedy for restitution or *quantum meruit*, even though the assessments were not directly paid to the Board. *See Earheart v. William Low Co.*, 25 Cal. 3d 503, 510-511, 158 Cal. Rptr. 887, 891 (Cal. Sup. Ct. 1979).

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2. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 n.9 (1982) (Fifth Amendment protects individuals from deprivation of property without regard to whether the Government receives the property or directs a third party to receive it.)

When the Government seeks recovery of its response costs under CERCLA or is abatement costs under RCRA it is seeking *equitable* relief in the form of restitution or reimbursement of the costs that it expended. *United States v. North Eastern Pharmaceutical Chemical Co., Inc.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). Here the Petitioners spent the money at Respondent's mandate for the benefit of the Respondent's program instituted to raise grower revenue. It was not spent by the handlers on the handlers' own behalf. Thus, this request for a refund, is not one for "money damages", but an attempt to provide the Petitioners the very thing to which [they were] entitled." *Bowen v. Massachusetts*, *supra*, 487 U.S. 879, 895 (1988). Petitioners were *lawfully* entitled to keep their money.

2. USDA cannot deny Handlers both a pre- and post-deprivation remedy without violating due process. *McKesson Corp. v. Div. Alcoholic Beverages & Tobacco, Fl. Dept. of Business Regulations*, 496 U.S. 18, 31 (1990) (and cases cited therein); *Harper v Virginia Dept. of Taxation*, 509 U.S. __, 113 S. Ct. 2510, 2519 (1993); *Reich v. Collins*, __ U.S. __, 115 S. Ct. 547, 550-551 (1994). It cannot be assumed that Congress intended to violate the Due Process rights of handlers who are unconstitutionally required to pay assessments or to spend assessments while they exhaust administrative remedies.

The Government has no more power to order an unconstitutional tax paid to it than it has to order an unconstitutional tax paid to a third party.[3] It cannot, therefore, then defend against a refund of the unconstitutional tax by claiming "sovereign immunity," while the Government precludes any suits to enjoin the tax collection.

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3. Respondent's attempt (Br. in Opp. 10) to distinguish these cases on the grounds that none of those tax cases involved federal defendants is incredibly shallow, given that the Due Process Clause of the Fifth Amendment applies to the Federal Government.

3. The Respondent erroneously claims (Br. in Opp. 13, n. 11) that the Government's sovereign immunity defense would still apply if the refunds came from the Almond Board or if the Petitioners received credits against future assessments. First, refunds from the Almond Board would not affect the treasury one wit, as no appropriated funds are used by the Almond Board. Secondly, Petitioners receiving credits against future assessments would not at all affect the treasury, nor is it a recovery of "money damages", and is not precluded by the specific statutory scheme (7 U.S.C. § 608c(15)(A) & (B)). Indeed, it has been recognized by this Court that sovereign immunity is not violated by allowing a taxpayer to off-set a tax obligation with a previous overpayment of taxes. (*United States v. Dalm*, 494 U.S. 596, 602-606 (1990).

CONCLUSION

It is important for this Court to grant the Petition to provide handlers with the remedy that the Government made them assume they had all along if they complied with the assessment orders. Respectfully, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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